# Good Carriage Sdn Bhd v Sendi Emas Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S2–23–490 OF 1998
KAMALANATHAN RATNAM J
11 JANUARY 1999

***Civil Procedure*** *— Injunction — Application for — Uncertainties on agreement — Money had been paid out — Whether application should be granted*

The defendant was awarded a contract ('the main contract') to complete the outside works to Tenaga Nasional Research and Development Centre at Bangi. The defendant then offered the plaintiff a tender based on the main contract for a total contract sum of RM2,251,390.31. The plaintiff contended that pursuant to three interim certificates, a sum amounting to RM253,469.67 was due to the plaintiff. The defendant pointed out that since the plaintiff had failed to complete the works under its contract, the parties had by mutual agreement terminated the plaintiff's employment as its sub-contractor. The plaintiff applied to injunct the defendant from disposing a sum of RM253,469.67 due from the defendant to the plaintiff until the final disposal of this suit.

**Held**, dismissing the application:

The plaintiff had not been candid with the court. The plaintiff had signed a purported letter of agreement confirming the right of the defendant to make payments out of the sum due to the plaintiff, in the event the plaintiff failed to honour its commitments to the various sub-contractor to whom the plaintiff owed money. On the plaintiff's contention that the so-called agreement was a forgery, the court could not exercise its discretion and grant the injunction sought based on uncertainty. In any case, the money had been paid out to a third party (see p 694E–F).

**[Bahasa Malaysia summary**

Defendan telah diberi satu kontrak ('kontrak utama') untuk menyiapkan kerja-kerja luaran Pusat Penyelidikan dan Pembangunan Tenaga Nasional di Bangi. Defendan kemudiannya telah menawarkan plaintif suatu tender berdasarkan kepada kontrak utama bagi jumlah RM2,251,390.31. Plaintif menyatakan bahawa mengikut tiga sijil interim, satu jumlah sebanyak RM253,469.67 telah terhutang kepada plaintif. Defendan menyatakan bahawa oleh kerana plaintif telah gagal untuk menyiapkan kerja-kerja yang terdapat di dalam kontrak, maka pihak-pihak yang terbabit telah sama-sama bersetuju untuk menamatkan kontrak plaintif sebagai sub-kontraktornya. Plaintif telah memohon agar defendan dilarang daripada melupuskan jumlah RM253,469.67 yang terhutang oleh defendan terhadap plaintif sehingga akhir guaman ini.

**Diputuskan**, menolak permohonan:

Plaintif telah tidak berterus-terang dengan mahkamah. Plaintif telah menandatangani satu surat perjanjian memberikan hak kepada defendan membuat bayaran dari jumlah yang terhutang kepada plaintif, jika plaintif gagal untuk memenuhi komitmennya, kepada kesemua sub-kontraktor yang plaintif berhutang. Mengenai pernyataan plaintif bahawa perjanjian tersebut adalah palsu, mahkamah tidak dapat menggunakan budi bicara dan memberikan injunksi yang diminta berdasarkan sesuatu yang tidak tentu. Lagipun, wang tersebut telah pun dibayar kepada pihak ketiga (lihat ms 694E–F).]

**Notes**

For a case on application for injunction, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 1928

*R Kengadharan* (*R Kengadharan & Co*) for the plaintiff.
*Rasamani Kandiah* (*Mohd Latip & Associates*) for the defendant.

**Kamalanathan Ratnam J**:

*The claim*

This is an inter partes application by the plaintiff to injunct the defendant from disposing a sum of RM253,469.67 due from the defendant to the plaintiff until the final disposal of this suit. I had on 14 Ogos 1998 granted an ex parte order in terms of this application. I heard the inter partes application on 5 October 1998 and dismissed the same with costs. Since an appeal has been filed against that decision, I now state my grounds.

*Facts*

By way of a letter dated 10 April 1998 Tenaga Nasional Berhad ('TNB') had awarded to the defendant a contract to complete the outside works to Tenaga Nasional Research and Development Centre at Bangi, Selangor Darul Ehsan ('the main contract'). To facilitate completion of the project the defendant entered into a factoring agreement with one Sogefactoring (M) Sdn Bhd to provide factoring facilities which were provided by way of a letter dated 25 April 1998 ('Sogefactoring'). The defendant also obtained TNB's consent to assign all amounts due under the main contract by way of a deed of assignment, to Sogefactoring, the assignee.

The defendant then offered the plaintiff a tender based on the main contract for a total contract sum of RM2,251,390.31.

*Case for the plaintiff*

The plaintiff now contends that pursuant to three interim certificates, a sum amounting to RM253,469.67 is due to the plaintiff.

*Case for the defendant*

The defendant pointed out that since the plaintiff had failed to complete the works under its contract the parties had by mutual agreement (see exh BHBMS-5 to encl 18) terminated the plaintiff's employment as its sub-contractor. It was also the contention of the defendant that the termination was also based on the ground that any sums due would be settled 'on an amicable basis' and on terms to be agreed.

*Findings of the court*

This is a simple issue and I find that it is a manifest waste of this court's time for the plaintiff to pursue this fruitless appeal.

The plaintiff contends it is due the sum claimed. In his submission, Mr K Kengadharan pointed out that it is the defendant's case that the said sum has been released to one Peribumi Utama Sdn Bhd ('Peribumi'). The plaintiff argues that it had at no time instructed this release and that the said Peribumi was not even a party to the contract signed between the plaintiff and the defendant. It is the plaintiff's case that it has no knowledge why such payments were made to Peribumi.

It is my finding that the plaintiff has been far from candid with this court. In encl 22, the defendant's director had affirmed an affidavit enclosing exh BHBMS-9 which is a purported letter of agreement signed by the plaintiff's representative together with the defendant and various other sub-contractors confirming the right of the defendant to make payments out of the sum due to the plaintiff, in the event the plaintiff failed to honour its commitments to the various sub-contractors to whom the plaintiff owed money. When I pointed this to counsel for the plaintiff, he then referred me to his client's letter annexed to his client's affidavit (encl 28 exh GCSB-5). It is pertinent to reproduce this letter in full. It reads:

> Your Ref:
> Our Ref: Gc/33/844/98(580)/sh
> (AR Registered)
>
> Peribumi Utama Sdn Bhd
> No 20, Jalan 21,
> Taman Sri Melati,
> 68100 Selayang,
> Selangor Darul Ehsan
>
> Attn: Miss CH Foong
>
> Dear Miss Foong,
>
> *Cadangan Pembinaan Bangunan Tenaga Nasional Research and Development Center at Bangi, Selangor Darul Ehsan*
> *Certificates No 1 and Hijacked Progress Payments*
>
> The abovementioned refers.
>
> As per our record, you have hijacked our progress payments through cheques No BBMS 593996 — RM50,000 and BBMB 593997 — RM10,000 and cash

payment of RM70,790 for a total amount of RM130,790 (Ringgit Malaysia: One Hundred Thirty Thousand and Seven Hundred Ninety only) issued by Sendi Emas Sdn Bhd from the abovesaid project.

Take note that you are requested to refund the abovesaid payments from our progress payment account with Sendi Emas Sdn Bhd either in crossed cheque or Bank Draft pay in favour of Good Carriage Sdn Bhd within 7 (seven) days from the date of our letter, failing which we will take legal action against you without any further reference to you.

We further would stress that unless the above is refunded to us within the stipulated time expiry of the above deadline.

Regards,
Sgd

Wong Tuck Kuan
Managing Director

cc 1 Sendi Emas Sdn Bhd
(Attn: En Budz Hisham Mat Sari)
2 Tuan Hj Mat Sari Hamid PJK
3 Mr KS Chong
4 R Kengadharan & Co
(Advocates & Solicitors)

This letter was even copied to counsel.

Now the plaintiff contends that the so-called agreement (exh BHBMS-5) which he is deemed to have signed is a forgery and that he has even lodged a police report to this effect. Based on all these uncertainties there is no way that this court will exercise it discretion and grant the injunction sought. In any case, the money has been paid out to Peribumi. Whether the defendant ought to have done so is a matter that must be decided at trial. Therefore status quo ought to be maintained by refusing this application. I will now fix the case for case management to 13 January 1999.

*Application dismissed.*

Reported by Zahid Taib